**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MARVIN L. BURGESS, JR.** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,020,528 |
| **BESEL ROOFING & HEATING COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND** | ) | |
| Insurance Fund | ) | |

## ORDER

Respondent and its insurance fund appealed the November 14, 2005, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on February 14, 2006.

### APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance fund.

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

### ISSUES

This is a claim for an October 6, 2003, automobile accident and resulting injuries to claimant's neck and low back. In the November 14, 2005, Award, Judge Foerschler determined claimant's automobile accident arose out of and in the course of his employment with respondent. The Judge also found claimant sustained a 61 percent permanent partial general disability as defined by K.S.A. 44-510e. In addition, the Judge reduced claimant's award of disability benefits under K.S.A. 44-501(c) for a 10 percent preexisting functional impairment. Consequently, the Judge granted claimant permanent

disability benefits for a 51 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent and its insurance fund contend Judge Foerschler erred. They argue claimant's accident occurred after he had left the job site for the day and, therefore, claimant's accidental injury did not arise out of and in the course of his employment. Consequently, respondent and its insurance fund request the Board to deny claimant's request for workers compensation benefits.

Conversely, claimant requests the Board to affirm the Judge's finding that his accident arose out of and in the course of his employment with respondent. Furthermore, claimant argues his award should not be reduced for preexisting impairment and that his work disability should be either 61 percent or 87.5 percent or, in the alternative, he should receive benefits for a permanent total disability.

The issues before the Board on this appeal are:

1. Did claimant's accident arise out of and in the course of his employment with respondent?

2. If so, what is the nature and extent of claimant's disability?

3. Should claimant's award be reduced under K.S.A. 44-501(c) due to preexisting impairment?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes, as follows:

Claimant, who was 46 years old at the time of the regular hearing, began working for respondent in April 2003 as an installer of duct work and heating and cooling equipment. The job was physically demanding. Within a few months of joining respondent, the company gave claimant a pickup to drive.

Claimant worked on new residential construction. At the end of his workday, claimant would drive the company pickup from his work site to home. The evidence is uncontradicted that both claimant and respondent benefitted from claimant having the pickup. Obviously, claimant had transportation to and from work. Less obviously, respondent benefitted as it could more readily rely upon its employees who drove its vans and pickups to arrive at work in a safe and timely manner and to arrive at the work site with all the necessary tools and the proper materials. Other benefits cited by respondent's

representatives included advertising, as respondent's name was displayed on the company vehicles, and more secure parking, as respondent did not have the facilities to park all of its vehicles indoors. To help offset the costs of the vehicles, respondent charged those employees who chose to drive its vehicles the sum of $5 per week.

On October 6, 2003, claimant left the construction site where he had been working and began driving his company pickup home. According to claimant, he always left the work site early enough to be home at 4 p.m., when he believed his workday ended. On October 6, 2003, claimant left the work site at approximately 3:45 p.m. and within minutes was rear-ended while stopped in traffic.

Claimant did not initially feel that he was injured. But the next morning he could hardly move as he was hurting from his neck to his tailbone. Claimant then sought medical treatment and eventually, in January 2004, underwent neck surgery that included a discectomy and fusion to address a herniated disc at the C5-6 intervertebral level. Claimant's neck surgeon last saw him in approximately July 2004 and released him with permanent work restrictions: no lifting more than 20 pounds up to his waist; no lifting more than 10 pounds over his shoulders; and no repetitive bending, lifting or stooping.

Claimant has not worked anywhere since the accident. And claimant has not looked for employment because he feels he is unable to work. Claimant testified he spends from six to eight hours per day lying in bed with pain, despite taking from three to 12 Aleve per day. At his May 2005 regular hearing, claimant testified he still experiences problems with his neck, shoulder area, low back and migraine headaches.

**1. Did claimant's accident arise out of and in the course of his employment with respondent?**

Whether an accident arises out of and in the course of employment is a question of fact and, therefore, depends on the facts peculiar to the case.[1]

As claimant was required to work at different construction sites, travel to and from those sites was a necessary part of his employment.[2]

Moreover, the evidence is uncontradicted that both claimant and respondent benefitted from claimant driving his company pickup to and from work. And under similar

[1] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[2] See *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

facts, the Kansas Court of Appeals in *Sumner*[3] held the "going and coming rule" as set forth in K.S.A. 2003 Supp. 44-508(f) did not bar a claim for workers compensation benefits. Mr. Sumner was killed while driving his employer's truck home to tend to an emergency. Mr. Sumner, who kept his truck at home every night, intended to deliver his load after he tended to the emergency, if time permitted. If time did not permit, Mr. Sumner would deliver his load the next morning. Unfortunately, Mr. Sumner did not reach home.

In *Sumner*, the Kansas Court of Appeals specifically addressed the "going and coming rule" and workers who are allowed to drive their employers' trucks home.

> Going home at the end of the workday is always personal. However, when the evidence indicates that an employer's policy is to allow drivers to take company trucks home, it furthers the employer's interests and is an exception to the "going and coming" rule.[4]

The *Sumner* decision follows the reasoning of the *Butera*[5] decision, in which the Kansas Court of Appeals stated that when determining whether a given daily commute falls within the scope of the Act, it is helpful to examine whether the travel presents an increased risk to the employee or an increased utility to the employer.

In conclusion, claimant's accident occurred while he was on his way home with the company truck. Driving the truck home benefitted respondent and furthered its interests. Further, claimant's travel to and from different work sites was required by his job. Consequently, claimant's October 6, 2003, accident arose out of and in the course of his employment with respondent.

**2. What is the nature and extent of claimant's disability?**

Claimant's medical expert, Dr. Edward J. Prostic, examined claimant on December 10, 2004. According to Dr. Prostic, as a result of the October 2003 accident claimant herniated his cervical disc at the C5-6 intervertebral level and also aggravated disc disease in his low back. Using the AMA *Guides*[6] (4th ed.), the doctor rated claimant's permanent functional impairment at 25 percent to the whole person.

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[3] *Sumner v. Meier's Ready Mix, Inc.*, ___ Kan. App. 2d ___, 126 P.3d 1127 (2006), *petition for review filed*.

[4] *Id.* at Syl. ¶ 7.

[5] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 546, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Dr. Prostic further concluded that claimant should not return to duties that require lifting more than 25 pounds occasionally or five to 10 pounds frequently. Additionally, the doctor would restrict claimant from working above his shoulders, using vibrating equipment, repetitious bending or twisting at the waist or forceful pushing or pulling. After reviewing the list of work tasks prepared by claimant's vocational expert, Michael J. Dreiling, the doctor concluded claimant should no longer perform 15 of 20, or 75 percent, of the tasks claimant performed in the 15 years before his accident.

Dr. Prostic did not differentiate what restrictions, if any, related solely to the low back. But the doctor, however, did testify the restriction against vibrating equipment related to claimant's neck injury. Accordingly, it appears Dr. Prostic's 75 percent task loss opinion incorporates both claimant's neck and low back injuries.

Claimant testified that he was unable to work or even look for work. But Dr. Prostic testified that claimant was capable of working and engaging in substantial and gainful employment as long as claimant complied with the recommended work restrictions.

The Board is not persuaded that claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, claimant's request for permanent total disability benefits under K.S.A. 44-510c should be denied.

Conversely, claimant is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e. That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is

> engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

The Kansas Court of Appeals in *Watson*[10] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[11]

The Board finds claimant failed to make a good faith effort to look for appropriate employment following his accident and, therefore, a post-injury wage should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. The only vocational expert to testify, Michael J. Dreiling, testified that Dr. Prostic's

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] *Id.* at 320.

[10] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[11] *Id.* at Syl. ¶ 4.

recommended work restrictions would limit claimant to light duty work. And assuming claimant worked within those restrictions he would be expected to earn approximately $8 per hour. Based upon that evidence, the Board concludes claimant retains the ability to earn approximately $320 per week, which yields a 47 percent wage loss when compared to claimant's stipulated $600 pre-injury average weekly wage.

Dr. Prostic's opinion that claimant has lost the ability to perform 75 percent of his former work tasks is uncontradicted. That task loss opinion is not unreasonable. Accordingly, the Board finds claimant's task loss for the permanent partial general disability formula is 75 percent. And averaging claimant's 75 percent task loss with his 47 percent wage loss creates a 61 percent work disability. The Board affirms the Judge's finding that claimant sustained a 61 percent permanent partial general disability.

**3. Should claimant's award be reduced under K.S.A. 44-501(c) due to preexisting impairment?**

Dr. Prostic concluded claimant aggravated the preexisting disc disease in his low back. Claimant testified that he underwent low back surgery in the 1990s. Dr. Prostic testified he was aware that claimant had undergone a laminectomy in his lumbar spine. Accordingly, the doctor felt claimant had a preexisting functional impairment of 10 percent due to his preexisting disc disease. The Board finds respondent and its insurance fund have established, by the barest of margins, that claimant's permanent disability award should be reduced by 10 percent. By considering the context of Dr. Prostic's testimony, the Board concludes the doctor's 10 percent rating related to the whole person and was pursuant to the AMA *Guides* (4th ed.).

In short, the Board affirms the Judge's conclusion that claimant's permanent disability award should be reduced by 10 percent. Consequently, claimant is entitled to receive benefits for a 51 percent permanent partial general disability.

## AWARD

**WHEREFORE**, the Board affirms the November 14, 2005, Award entered by Judge Foerschler.

**IT IS SO ORDERED.**

Dated this ____ day of March, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director